No. (1)

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

CHRISTOPHER S. SIDWELL,

Petitioner,

v.

EXPRESS CONTAINER SERVICES, INC. and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Fourth Circuit err in deciding that the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 *et seq.*, applies only to a site physically contiguous with and actually touching the navigable waters of the United States?

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Decision of the United States Court of Appeals for the Fourth Circuit: Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. December 28, 1995) (No. 95-1101).

STATEMENT OF JURISDICTION

The immediate case arose under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. ("LHWCA" or "Longshore Act" or "Act"). The Administrative Law Judge of the U.S. Department of Labor had jurisdiction to hear the claim, and the Benefits Review Board had jurisdiction to hear the appeal therefrom, under Sections 919(c) & (d) and Section 921(b)(3) of the LHWCA. The U.S. Court of Appeals for the Fourth Circuit had jurisdiction to hear the appeal from the

Benefits Review Board pursuant to Section 921(c) of the LHWCA. The decision of that court was rendered on December 28, 1995. A sua sponte Suggestion of Rehearing en banc was raised subsequent to the rendering of that decision. That Reconsideration was denied by the Court of Appeals by Order filed on January 29, 1996.

This Court has jurisdiction to review the decision of the Court of Appeals for the Fourth Circuit by way of certiorari under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

33 U.S.C. Section 903(a):

Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

This matter involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. ("LHWCA" or "Longshore Act" or "Act"). The matter was heard before Administrative Law Judge Richard K. Malamphy of the United States Department of Labor to determine whether there was jurisdiction under the Longshore Act with respect to injuries suffered by Petitioner, Christopher S. Sidwell, on June 11, 1990. Petitioner was injured at a site regularly used by his employer to repair ship loading and unloading equipment, specifically containers and their chassis. Respondent, Express Container Services, Inc., had relocated its container repair facility from a site immediately adjoining Portsmouth Marine Terminal in Portsmouth, Virginia to a location off-terminal due to terminal expansion and the terminal's need for Respondent's site. Respondent's off-terminal location is more spacious and efficient, and, as a result, Respondent's maritime business was improved in the new location.

Judge Malamphy issued a Decision and Order on May 7, 1992 denying compensation benefits to Petitioner because he found that

the locus of Petitioner's injuries did not meet the situs test for jurisdictional coverage under the Longshore Act (App.C. at LXI-LXII).[2]

Claimant requested review before the Benefits Review Board of the U.S. Department of Labor. The Board issued a Decision and Order, dated December 29, 1994, affirming the decision of the Administrative Law Judge. The Board determined that the container repair facility in question was not a covered situs under the jurisdictional requirements of the LHWCA (App.B. at XLVI-XLVII).

Claimant requested review before the United States Court of Appeals for the Fourth Circuit. In an Opinion, written by Judge Luttig, and joined in by Judge Widener, a panel of the Court of Appeals affirmed the decision of the Benefits Review Board and held that the locus of Petitioner's injuries was not a covered situs under the LHWCA. The Court of Appeals held that coverage for those injuries was barred, stating:

> Accordingly, we hold that an area is "adjoining" navigable waters only if it "adjoins" navigable

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[2] Page citations referenced by "App." will refer to the various Appendices attached to the immediate Petition for Writ of Certiorari.

> waters, that is, if it is "contiguous with" or otherwise "touches" such waters.[] If there are other areas between the navigable waters and the area in question, the latter area simply is not "adjoining" the waters under any reasonable definition of that term.

71 F.3d 1134, 1138-39 (App.A. at XVII-XVIII) (footnote omitted). Further, in a footnote omitted for purposes of the above citation, the Court of Appeals stated as follows:

> Sidwell argues that whether terminal expansion has forced relocation from a site directly adjoining navigable waters to one that does not adjoin such waters (but is the closest feasible), is relevant to whether a particular site adjoins navigable waters. We disagree. The exigency of even a forced relocation cannot transform a site distant from navigable waters into one that somehow "adjoins" those waters. The site either adjoins navigable waters or it does not . . . .

71 F.3d at 1139 (App.A. at XVII-XVIII).

In a concurring Opinion, Judge Beaty

voiced his disagreement with the creation of a more restrictive situs test than those previously pronounced and applied in both the Fourth Circuit and other federal circuits. In so doing, Judge Beaty stated:

> The majority, however, now favors creation of a more literal interpretation which will serve to exclude coverage, if the site in question does not actually touch navigable waters. This new test is crafted by defining "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" as merely an extension of the enumerated sites which actually touch navigable waters. Such an interpretation would render the additional proviso superfluous. Congress by use of the phrase "or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel" provided a description of additional areas that would satisfy the situs test without actually requiring these additional sites to actually touch navigable waters. If Congress intended to further limit coverage, there would have been no need to describe additional covered

sites beyond those already enumerated in the statute.

71 F.3d at 1143 (App.A. at XXXI-XXXII).

Petitioner now seeks the review of this Honorable Court.

REASONS FOR GRANTING THE WRIT

I. *The decision of the Court of Appeals in this case is in direct conflict with the decisions of the Courts of Appeals in three other judicial circuits.*

Section 3(a) of the LHWCA establishes the jurisdictional requirements for coverage under the Act. The provision provides for coverage for disability to or death of an employee where the injury occurs "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. Section 903(a). The descriptive language in the parentheses was not contained within the provision as originally enacted, but instead was added through the 1972 amendments to the LHWCA. In the Senate and House Committee Reports corresponding to the addition of this language, Congress indicated that the intent behind the addition of the language was "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep.

No. 92-1125, 92nd Cong., 2d Sess. 12-13 (1972) (emphasis added); H.R. Rep. No. 92-1141, 92nd Cong., 2d Sess. (1972) (emphasis added), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4707-08. Accordingly, although the Act did not previously cover injuries occurring on land, Congress altered the language to provide for such coverage. In doing so, the Senate Report enunciated the belief embodied in the amendment "that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." Id.

Courts interpreting the jurisdictional reach of the LHWCA subsequent to the 1972 amendments have uniformly interpreted the Act as requiring both "status" and "situs" in order to invoke the coverage of the Act. See, e.g., Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 264-65 (1977). The former refers to the nature of the work generally performed by the employee in question and is governed by the definition of "employee" in Section 902(3) of the LHWCA and the use of that term in Section 903(a) of the Act. The latter, which is at issue in this case, refers to the actual location where the injury occurred and its relationship to the navigable waters of the United States.

While generally uniform with respect to the existence of the status and situs tests, courts interpreting and applying the situs requirement have invariably utilized very divergent tests to determine whether a given claimant is covered under the Act. The most prominent, prior to the immediate case, were the tests enunciated in the cases of Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), and Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981).[3]

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[3] Note that the U.S. Court of Appeals for the Third Circuit enunciated a third situs test in the case of Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976). In that case, the court stated that "[a]s long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available[, because] [r]esuscitating the situs requirement in cases satisfying the status test [would] interfere with Congress' intention to eliminate the phenomenon of shifting coverage." 540 F.2d at 638. In keeping with that standard, the Sea-Land court appeared to favor a case-by-case approach whose focus is not the geographic relationship with the navigable waters of the United States, but the "location of the interface between the air[,] land and the water modes of transportation." Id. at 638.

In Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 264-65 (1977), this Court noted that the Sea-Land test "appears to have essentially discarded the

In the 1978 case of Brady-Hamilton, the Court of Appeals for the Ninth Circuit delineated a situs test which mandated consideration of four factors in making the situs determination: (1) the particular suitability of the site for maritime purposes; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) proximity to the waterway; and (4) whether the adjoining site is as close to the waterway as feasible. 568 F.2d at 141. In doing so, the Ninth Circuit interpreted the "adjoining area" language in Section 903(a) as describing a "functional relationship that does not in all cases depend upon physical contiguity." Id. In addition, the Brady-Hamilton court underscored that a primary consideration in making the situs determination is the extent to which the choice of the site upon which the injury occurred was governed by considerations of maritime economy. Id. Upon application of the above test, the Brady-Hamilton court held that a contract stevedore's gear lockerman, who was injured while unloading steel plates from a pickup truck parked at a gear locker

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situs test." Id. at 277 n.40. Accordingly, the case is noted for illumination of the lack of uniformity among the circuits, but is not further relied upon in the immediate Petition.

located 2,600 feet north of a river's edge and 2,050 feet outside of the port's entrance gate, met the situs requirement for coverage under the LHWCA. Id. at 139-41.

Two years later, the Court of Appeals for the Fifth Circuit, in Texports Stevedore Co., established a separate case-by-case inquiry that was to be applied in that jurisdiction when determining whether the situs requirement was met. 632 F.2d 504, 514. In doing so, the court stated:

> [W]e . . . reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. . . . The site must have some nexus with the waterfront.

Id. The court further stated:

> We reject the position that the presence or absence of nonmaritime buildings between the point of injury and the water is an absolute test for whether an injury is covered under the LHW[C]A. Such a

> rule would introduce into the tests for coverage a new fortuity that would frustrate the congressional objective of providing a uniform system expanding coverage to landward maritime sites.

Id. at 513. Accordingly, the Texports Stevedore court held that a worker who was injured in a gear room some five blocks from the waterfront in a building which was located as near to the waterfront as feasible and whose operations were part of the ongoing overall loading process met the situs requirement for jurisdictional coverage under the Act. Id. at 515-16.

Most recently, the U.S. Court of Appeals for the Second Circuit cited with approval the approaches taken in Brady-Hamilton and Texports. Triguero v. Consolidated Rail Corp., 932 F.2d 95, 100-01 (2nd Cir. 1991). Specifically, the Triguero court held that the situs test was met where the claimant's injury occurred in a container yard separated from navigable waters by a public street and independent maritime facilities and located approximately one and one-quarter miles from the employer's dockside facility. Id. at 101. In so doing, while not delineating a specific situs test for its own use, the Second Circuit adopted a "functional" approach to the situs

requirement in which distance from a navigable waterway or separation from that waterway by roads or property boundaries is not dispositive. See id.

In the face of this precedent, the Court of Appeals for the Fourth Circuit in the instant case delineated yet another situs test distinct from those set forth in the Second, Fifth, and Ninth Circuits. As highlighted above, this test is highly restrictive and limits coverage under the Act within the Fourth Circuit to areas which physically touch the navigable waters of the United States. In so doing, the Court of Appeals specifically stated that "[i]f there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." 71 F.3d 1134, 1138-39 (App.A. at XVII-XVIII). In making this determination, the Court of Appeals specifically rejected the additional tests utilized by the Fifth and Ninth circuits when making identical determinations under the LHWCA.[4] Likewise, the Court of Appeals introduced a test which (1) develops a hard line approach in direct conflict with the

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[4] Note that the court did not address the Triguero decision.

language of the Fifth Circuit's decision in Texports Stevedore Co.; (2) seemingly focuses the inquiry on property divisions and fence lines in conflict with the approaches delineated by the Ninth, Fifth, and Second Circuits in Brady-Hamilton, Texports Stevedore Co., and Triguero, respectively; and (3) fails to account for any of the functional factors outlined by the Ninth Circuit in Brady-Hamilton. In so doing, the court illuminated the sharp contrast among the four circuits in the manner in which this element of jurisdictional coverage under the Act is interpreted and applied.

In light of this divergence across these circuits, the immediate case is quite appropriate for review by this Court. The LHWCA was enacted and amended to provide for uniformity of coverage to similarly situated workers' across differing federal circuits. As it stands, coverage under the Act's jurisdictional situs requirement is no longer determined by the locus of injury and its relationship to the navigable waterways of the United States, but instead by which judicial district has jurisdiction over that location. This potential for disparate results based upon factors foreign to the letter of the Act clearly calls for resolution of the issue by this Court without delay.

II. ***The decision of the Court of Appeals in this case is in direct conflict with prior decisions of other panels of the Court of Appeals for the Fourth Circuit***.

In addition to establishing a test in the immediate case which contrasts sharply with the applicable tests of other circuits on the same issue, the Court of Appeals' decision is decidedly in contravention of prior precedent within the Fourth Circuit.

The Court of Appeals for the Fourth Circuit had specifically addressed the situs requirement under the LHWCA on two prior occasions. The first was in Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), in which the court, while not purporting to establish a comprehensive test for situs coverage, held that two sites, a submarine shop 1,200 feet from the water's edge and a foundry 3,000 feet from the water's edge, satisfied the situs test because they were "integral parts of the shipyard." Id. at 169. The focus in that case was generally upon the nature of the work performed in the area in question with respect to the navigable waterways of the U.S., as opposed to the physical proximity of that area to the water.

Indeed, the foundry injury at issue in that case occurred approximately two and one-half blocks from the water's edge and was separated from the water by two public streets. See Jones v. Newport News Shipbuilding & Dry Dock Co., 5 BRBS 323, 324-25 (1977), aff'd Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (1978).

In the case of Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), cert. denied, 485 U.S. 1028 (1988), the Fourth Circuit again addressed the situs issue, citing several factors which, in that case, militated against coverage of the Act. Those factors included (1) that the injury in question occurred well over a mile from the employer's terminal; (2) that the injury occurred along a public highway which did not connect any portions of employer's terminal or traverse continuous or contiguous terminal areas; (3) that, while the restaurant from which the claimant was traveling was arguably located in a waterfront area, it was separated from any navigable waterway or maritime terminal by a residential neighborhood; (4) that the restaurant from which the claimant was traveling was not the closest one to the terminal; and (5) that the restaurant was not an integral part of employer's terminal. Id. at 375. Again, as in Graham, the Humphries

court indicated that, while not "venturing to offer a touchstone for all future LHWCA jurisdictional questions, . . . ," the proper inquiry in a situs determination is on the character of the area in which the injury occurs. Id. at 374, 375. Further, the Humphries court stated that a situs "need not be . . . within any specified distance of navigable waters or a 'maritime' operation" to fall within the scope of the Act. See id. at 373.

In contrast to the "functional" focus seemingly established by this precedent, the Court of Appeals in the immediate case established that the determinative factor in a situs inquiry is whether the area in question actually touches navigable water and whether the area in question is separated from that water in any way, shape, or form. The significance of this alteration in light of its contrast with precedent both within and without the Fourth Circuit cannot be ignored. As such, these conflicts require proper redress by this Court.

This conclusion is especially pertinent in light of Judge Murnaghan's concurring opinion in the recent Fourth Circuit Court of Appeals panel decision in Parker v. Director, OWCP, 75 F.3d 929 (4th Cir. February 9, 1996) (No. 94-2653). In that case, the court again

denied coverage under the LHWCA for lack of situs, based exclusively on the ruling in the immediate case that an injured worker is not covered where the locus of his injury does not actually touch the navigable waters of the United States. The court there held that the claimant at issue was not covered under the LHWCA where his injury occurred on a site not physically touching the water, located five miles from Norfolk International Terminal, and separated from the water by various small businesses and roads. Id. at 931-33. In his concurring opinion, Judge Murnaghan voiced his disagreement both with the restrictive holding of the Sidwell panel and with the resulting finding that Parker was not injured in an "adjoining area."

Judge Murnaghan initially stated his belief that the Sidwell court's "interpretation of the LHWCA's phrase 'other adjoining area' is entirely at odds with the meaning that Congress intended [courts] to ascribe to it." Id. at 935. In support of that conclusion, Judge Murnaghan cited the legislative history of the 1972 amendments to the Act, which expresses an unequivocal concern for the lack of uniformity in coverage under the pre-amendment Act. Id. at 14. In addition, Judge Murnaghan pointed to the policy of liberal construction embodied in the

Act in order to effectuate its remedial purposes, as enunciated in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977). In keeping with both this construction and the clear desire for broadened, yet uniform, situs coverage under the Act as amended, Judge Murnaghan intimated that a "functional" approach to situs coverage is preferable to the hard-line and restrictive approach enunciated in Sidwell. Parker, at 938-40. Indeed, he noted that, as highlighted herein, the Sidwell ruling runs directly contrary to rulings from various other federal circuits. Id. at 939. Further, Judge Murnaghan highlighted the fact that the Fourth Circuit had in fact employed such functional approaches in the past in cases such as Humphries, 834 F.2d 372, and Graham, 573 F.2d 167. Specifically, he cited Humphries for the proposition that a "situs 'need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation' for it to be within the LHWCA's scope." Parker, at 938 (citing Humphries, 834 F.2d at 373).

Finally, even aside from his concern with the conflict the Sidwell test creates with other circuits and with prior Fourth Circuit precedent, Judge Murnaghan pointed to the specific language utilized in the Act as

amended. He noted that "adjoining" means "touching or bounding" or being "near in space." Id. at 939 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 27 (1981)). In light of this definition, he stated:

> Recognizing our duty to interpret the statute broadly so that Congress's remedial objectives may be achieved, . . . we should hold that the phrase 'other adjoining area' does not require that an area be contiguous with navigable waters for that area to be covered by the LHWCA. To hold otherwise not only violates our duty to accord the statute a broad interpretation, but also fundamentally conflicts with the approach we took in Humphries.

Id. (internal citation omitted). In essence, Judge Murnaghan concluded that an unduly restrictive interpretation of the situs requirement would ultimately subject claimants to the very "harsh" and "incongruous" results which prompted Congress to amend the situs requirement in the first place. Id. at 940 (citing Northeast Marine Terminal Co., Inc. v.

Caputo, 432 U.S. 249, 268 (1977)).[5]

The above conflict again serves to illuminate the divergence and lack of uniformity which currently accompanies the situs test under the LHWCA. Indeed, the split within the very circuit which pronounced the restrictive test at issue in this case, both in case law and judicial opinion, demonstrates the need for binding interpretation by this Court.

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[5] Refer as well to the concurring opinion of Judge Beaty in Sidwell. 71 F.3d 1134, 1142 (App.A. at XXX). Judge Beaty position essentially mirrors the sentiments pronounced by Judge Murnaghan in Parker. Specifically, as Judge Murnaghan did in Parker, Judge Beaty disagreed with the delineation of a restrictive situs test which limits coverage under the Act to areas which actually touch the navigable waterways. 71 F.3d at 1143 (App.A. at XXX-XXXIII). Further, Judge Beaty stated that a functional approach such as that utilized in Brady-Hamilton could provide an appropriate and uniform framework for the situs inquiry without being unduly restrictive in the fashion chosen by the majority. Id.

III. ***The decision of the Court of Appeals in this case involves the important federal question of what constitutes a covered situs under the Longshore Act, which has not been, but should be, decided by this Court.***

This Court has in past years addressed issues which relate in part to the situs issue presented in this case. For example, in Director, OWCP v. Perini North River Assocs., 459 U.S. 297, 324 n.32 (1983), this Court held that the requirements of "status" and "situs" are distinct. In addition, this Court held in Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426 (1985), that neither requirement should be read to render the other superfluous. Finally, in Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977), this Court confronted the issues of whether two claimants met the jurisdictional status and situs requirements under the Longshore Act. In addressing these concepts, the Court initially noted that the LHWCA should be liberally construed in conformance with its remedial purposes in a way which avoids harsh and incongruous results. Id. at 268. The Court then entertained a detailed discussion of the status requirement under the Act.

However, with respect to situs, the Court merely held that the locus of the claimants' injuries met the situs requirement as the facilities on which the injuries occurred were immediately adjacent to and physically touched navigable waterways. Id. at 279-81. However, the Court in no way addressed the issue of whether or not additional areas further removed from such a waterway would meet the situs requirement.[6]

Thus, the Court has never specifically addressed what test or factors should be utilized in determining whether the location of an individual's injury meets the situs requirement under the LHWCA. More definitively, the Court has never given any guidance as to what constitutes an "adjoining area" within the intent and scope of Section 903(a) of the Act. As a result, there is currently disparity in coverage under the Act because of the differing tests and factors outlined above.

There can be no doubt that, where a federal act such as the LHWCA evinces a clear legislative intent to provide for uniformity in application, and where the application that actually results across the various federal circuits is anything but uniform, the lack of

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[6] See supra n.3.

uniformity must be remedied. As this case presents the particular issue upon which the divergence outlined above is predicated, this case affords the Court the attractive opportunity to bring clarity to the law under the LHWCA and guidance to those who serve to uphold the tenants of that Act.

IV. *The decision of the Court of Appeals in this case is erroneous and is likely, given the significant volume of longshoring, shipbuilding, and commercial shipping activity which occurs within the Fourth Circuit, to have broad detrimental effects which will undermine the very purposes of the Longshore Act.*

The Fourth Circuit encompasses Maryland, Virginia, West Virginia, North Carolina, and South Carolina. Of primary note within that geographic area is the Hampton Roads region in southeastern Virginia. This area includes Newport News Shipbuilding and Dry Dock Co., one of the nation's largest shipbuilding and ship repair facilities for both private and United States Navy vessels. The facility physically covers approximately 550 acres and

contains the largest dry dock in the Western Hemisphere. The Port of Greater Hampton Roads Annual 1995, at 113-14 (1995). In addition, the facility currently employs nearly 20,000 employees involved in various facets of the shipbuilding and ship repair processes. Id. at 119. The shipyard itself has expanded over the course of the past several decades to the point that portions of the yard are separated by public streets not controlled or owned by the shipyard. Likewise, shipbuilding and ship-repair tasks often take place in areas not in direct contact with the property boundaries of the shipyard. The reason for this separation is again economic expansion of the shipbuilding and repair enterprises and the scarcity of waterfront land upon which such activities can be performed. At the same time, the various functions performed on these off-terminal cites are integral to the shipbuilding, ship repair, loading, and unloading activities which are the essence of the shipyard's business.

In addition to Newport News Shipbuilding, the Hampton Roads area is the location of numerous additional shipbuilding, ship repair, longshoring, and commercial cargo enterprises. Specifically, the area serves as the location for thirteen large shipbuilding and ship repair facilities; six international marine

container terminals; seven merchandise terminals; three coal terminals; one grain handling facility; and fifteen oil storage and handling facilities. Id. at 34-60.

Indeed, statistics show that, in 1993, more foreign water-borne commerce was exported through Hampton Roads than any other city on the East Coast. Id. at 5. Likewise, Hampton Roads ranked third in this category overall in the entire United States. Id. Further, in 1993, Hampton Roads handled over 53 million short tons of cargo and received over 2,500 vessel calls from vessels representing more than 80% of the world's leading shipping lines. Id. Finally, Hampton Roads is the largest coal port in the world. Id. at 124.

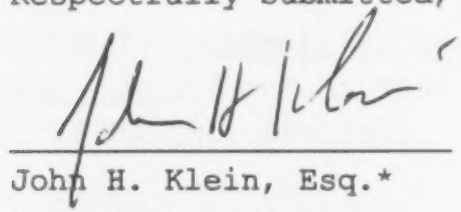
What the above facts demonstrate is that the propriety of the Court of Appeals decision limiting coverage under the Longshore Act through its restrictive application of the situs test is of particular importance because of the substantial maritime activity which occurs in the Fourth Circuit geographic area. Clearly, where the propriety of that decision is questionable in light of the divergent interpretations and applications of the situs requirement in other jurisdictions and within the Fourth Circuit itself, the need for a proper and appropriate resolution of the issue by this Court is indisputable.

CONCLUSION

In the immediate case, the Fourth Circuit Court of Appeals delineated a hard and fast rule which limits coverage under the LHWCA to individuals who are injured on property which physically touches the navigable waters of the United States. This limitation was made in contravention of significant precedent from three other federal circuits, and from the Fourth Circuit itself, which mandates various "functional" approaches to the situs inquiry under the LHWCA. The limitation appears also to conflict with the letter and spirit of the situs provision and with the judicial policy of broad interpretation of the situs requirement under the Act. In addition, when applied, the test is likely to both significantly limit coverage under the Act and to perpetuate disparate treatment of similarly-situated, similarly-employed maritime workers depending upon the physical location of their injuries.

In light of these notable disparities, and in the face of the policy of uniform application embodied in the LHWCA, Petitioner submits that this Court should exercise its power of discretionary review and provide for uniformity of coverage in keeping with the purposes of the LHWCA.

Respectfully Submitted,



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APPENDIX

APPENDIX A

Decision of the United States Court of Appeals for the Fourth Circuit: Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. December 28, 1995) (No. 95-1101).

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CHRISTOPHER S. SIDWELL,

Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, No. 95-1101

Intervenor,

v.

EXPRESS CONTAINER SERVICES, INCORPORATED,

Respondent.

On Petition for Review of an Order of the Benefits Review Board. (92-1720)

Argued: September 25, 1995

Decided: December 28, 1995

Before WIDENER and LUTTIG, Circuit Judges, and BEATY, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Luttig wrote the opinion, in which Judge Widener joined. Judge Beaty wrote a separate opinion concurring in the judgment.

COUNSEL

ARGUED: John Harlow Klein, RUTTER & MONTAGNA, Norfolk, Virginia, for Petitioner. Joshua Thomas Gillelan, II, Senior Attorney, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Intervenor. F. Nash Bilisoly, IV, VANDEVENTER, BLACK, MEREDITH & MARTIN, Norfolk, Virginia, for Respondent. ON BRIEF: Thomas S. Williamson, Jr., Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Intervenor.

OPINION

LUTTIG, Circuit Judge:

Appellant Christopher S. Sidwell was injured at a site eight-tenths of a mile from a ship terminal, while repairing a shipping

container. He sought compensation under the Longshore and Harbor Workers' Compensation Act. The ALJ denied Sidwell benefits, finding that the injury did not occur at a situs covered by the Act, and the Department of Labor Benefits Review Board affirmed. We affirm.

I.

Sidwell was injured on June 11, 1990, while working for his employer, Express Container Services ("ECS"), as a container mechanic at ECS's Chautauqua facility in Portsmouth, Virginia. ECS is in the business of repairing cargo containers and the chassis used to carry them. ECS voluntarily paid Sidwell temporary total disability benefits under the Virginia Workers' Compensation Act from June 12, 1990, through September 14, 1990, as well as medical benefits. J.A. at 78. Sidwell sought additional compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA").

ECS's facility was previously located near the gate of Portsmouth Marine Terminals, where vessels are loaded and unloaded from the Elizabeth River. In 1985, the terminal expanded and purchased ECS'S facility, at

which time ECS relocated to its present facility eight-tenths of a mile from the terminal. The current location is surrounded by various businesses and residential developments, including a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air-conditioning contractor, a gas station, a fire station, a container yard, a Nissan-owned storage area, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway. J.A. at 79.

ECS contracts directly with steamship lines and does not have any agreement with the terminal itself or with the Virginia Port Authority. Approximately 90% of the containers and chassis arrive at ECS via inland roads, while the remainder come from the terminal. ECS also performs minor repairs on containers at the terminal site, using mobile trucks. Employees do not ordinarily alternate between the terminal and Chautauqua sites. Sidwell, for example, worked at the Chautauqua site and had not worked at the terminal for over a year prior to his injury at Chautauqua. J.A. at 24-25.

The ALJ denied Sidwell benefits under the

LHWCA because he found that the Chautauqua site was not an "adjoining area" under the "functional relationship" test of *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978). The Benefits Review Board affirmed in an unpublished *per curiam* opinion, and this appeal followed.[1]

II.

Before 1972, coverage under the LHWCA "was determined primarily by the traditional 'locality' test of maritime tort jurisdiction." *See generally Humphries v. Director, OWCP*, 834 F.2d 372, 373 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988). Under this test, workers injured on navigable waters were covered under the LHWCA, while those injured on adjoining land, piers, or

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[1] The Clerk of this court originally denominated the Director of the Office of Workers' Compensation of the United States Department of Labor as an additional respondent but, in light of *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995), and under our circuit precedent in *I.T.O. Corp. v. Benefits Review Bd.*, 563 F.2d 646, 648 (4th Cir. 1977) (*en banc*) (*per curiam*), we dismissed the Director as a party because she was not a real party in interest. We did, however, exercise our discretion to permit the Director to intervene on behalf of the claimant (for whom she was already arguing in her brief).

wharves were covered only by state workmen's compensation laws. *Id.* As a consequence, longshoremen continually walked in and out of LHWCA coverage as they walked up and down the gangplank from ship to shore during the loading and unloading of vessels. S. Rep. 92-1125, 92d Cong., 2d Sess. 12-13 (1972).

In 1972, Congress addressed this problem of alternating coverage by amending the LHWCA so as to expand coverage to both navigable waters and "the adjoining land area." *Id.* at 13. In doing so, Congress legislated a "status" requirement and a "situs" requirement, both of which must be satisfied in order for the Board to have jurisdiction to award benefits. The status requirement limits coverage to

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker . . . .

33 U.S.C. § 902(3). The situs requirement limits coverage to

> [any] injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*).

33 U.S.C. § 903(a) (emphasis added).

The ALJ and the Board each found that in this case the situs test was not met, and Sidwell challenges that determination.

A.

The Supreme Court has not articulated a test for determining what is an "other adjoining area" under the LHWCA.[2] The Court has explained, however, that the requirements of "status" and "situs" are distinct, *Director, OWCP v. Perini North River Assocs.*,

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[2] The Court held in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 279-81 (1977), that a terminal that entirely adjoined the water was a covered situs, but a terminal is a situs expressly enumerated in the statute.

459 U.S. 297, 324 n.32 (1983) ("[T]he status requirement is occupational and the situs test is geographic."), and that neither should be read to render the other superfluous, *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426 (1985) ("[T]o classify [claimant's] employment as maritime because he was on a covered situs or in a 'maritime environment' would blur together requirements Congress intended to be distinct. We cannot thus read the status requirement out of the statute."); *see also P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 79 (1979) ("By understanding the term 'maritime employment' to embody an occupational rather than a geographic concept, we give the two phrases [status and situs] distinct and consistent meanings.").

The courts of appeals have developed essentially three different tests for determining whether an injury occurred on a covered situs. The three tests all begin from the premise that the statute does not really mean what it says, namely, that the injury must occur on navigable waters, at an enumerated adjoining location, or at another situs that actually "adjoins" navigable waters and is customarily used in loading, unloading, repairing, dismantling, or building vessels.

The Ninth Circuit in *Brady-Hamilton* reasoned that "the phrase 'adjoining area' should be read to describe a functional relationship that does not in all cases depend upon physical contiguity," 568 F.2d at 141. Under this test, whether an area adjoins navigable waters requires an examination of at least four factors, none of which necessarily even relates to whether the area is, in the words of the statute, "adjoining navigable waters." These factors, "among others," are,

> [1] the particular suitability of the site for the maritime uses referred to in the statute; [2] whether adjoining properties are devoted primarily to uses in maritime commerce; [3] the proximity of the site to the waterway; and [4] whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Id. In *Sea-Land Service, Inc. v. Director, OWCP*, 540 F.2d 629 (3d Cir. 1976), a decision the Supreme Court has criticized as appearing to "essentially discard[] the situs test," *Northeast Marine*, 432 U.S. at 277 n.40, the Third Circuit held that "[a]s long as the

employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available[, because] [r]esuscitating the situs requirement in cases satisfying the status test [would] interfere with Congress' intention to eliminate the phenomenon of shifting coverage."[3] 540 F.2d at 638. And in *Texports*

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[3] *See also Sea-Land*, 540 F.2d at 636, 638:

> The line delimiting the outer reaches of the Act's extended coverage is, we think, functional and not spatial. . . . It is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of injury, that in our view Congress referred to by its reference to navigable waters. . . . The limits of federal coverage is [sic] defined not by reference to a geographic relationship with the navigable waters of the United States, but by the location of the interface between the air[,] land and the water modes of transportation. If that interface is customarily located at some point remote from the pier, the fact that the stevedore uses public streets to move the cargo to or from a "terminal," a "building" or "other adjoining area" does not affect coverage. The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking,

Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), the Fifth Circuit *en banc* likewise effectively eliminated the situs requirement in favor of a case-by-case, "broad and nebulous" inquiry, *id.* at 518 (Tjoflat, J., dissenting), that affords coverage as long as there is "some nexus with the waterfront":

> [W]e . . . reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. We would not extend coverage in this case to downtown Houston. The site must have some nexus with the waterfront.

632 F.2d at 514.

Our circuit has considered the issue twice. In *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir.), *cert.*

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railroading or warehousing.

denied, 439 U.S. 979 (1978), we held in a one-paragraph discussion, "without purporting to offer a comprehensive test," *see Humphries*, 834 F.2d at 374, that two sites, a submarine shop and a foundry, 1200 feet and 3000 feet from the water's edge respectively, satisfied the situs test because they were both "integral parts of the shipyard." *Graham*, 573 F.2d at 169.

Then, in *Humphries*, we held that the situs requirement was not met when a ship foreman was injured in a car accident one and half miles from the terminal as he was bringing food for his workers back from a restaurant. In that case, we considered each of the three above-described tests. We rejected *Sea-Land* as "unacceptable" because it "effectively reads the explicit situs requirement out of the Act." 834 F.2d at 374. We characterized *Texports* as "an opinion which struggled bravely with the issue, [and] ended up with little more than a litany of factors which are *not* conclusive in a situs determination -- absolute contiguity with navigable waters, fence lines, local designations of the area, exclusive use for maritime purposes, and so on." *Id.* We noted that *Brady-Hamilton* "at first glance at least seem[ed] a more practical approach" than the

other tests advanced. *Id.* But ultimately we did not even decide the case under *Brady-Hamilton*. Instead, we expressly declined to "ventur[e] . . . a touchstone for all future LHWCA jurisdictional questions" and simply recited a number of factors which, in "combination," rendered the accident outside a maritime situs. *Id.* at 375.

It is against this backdrop that we now decide how it should be determined in this circuit whether the situs requirement of the LHWCA is satisfied.

B.

Sidwell argues that we should adopt the expansive approach of *Texports*, the Director urges us to embrace what is in effect (although she does not admit it) the even broader formulation of *Sea-Land*,[4] and ECS

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[4] The Director, for example, argues that maritime use should be a "strong" indication of situs, and that the "'primary' use of surrounding properties and . . . the *intervention* of a residential area between the situs of injury and the nearby navigable waters . . . *should be incapable as a matter of law of overcoming the fact that a site near the water is used for integrally maritime purposes*." Br. for the Director, OWCP at 29, 43 (second emphasis added).

defends the propriety of the *Brady-Hamilton* multi-factored "functional" test, which the Board applied in this case. Because none of these proffered tests even purports to follow the language of the statute -- indeed, for the most part they all openly disavow the statutory text -- we decline to adopt any of these tests.

As federal courts, we have repeatedly pledged to Congress that if it would speak clearly in its enacted legislation, we in turn would give effect to that clearly stated intent. In section 903(a), Congress has fulfilled that obligation, just as Justice Kennedy observed it had in section 33(g) of this same statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 484 (1992) ("Often we have urged the Congress to speak with greater clarity, and in this statute [the LHWCA] it has done so.").[5] Therefore, faithful

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[5] In *Cowart*, the question was whether the claimant, at the time of his third-party settlement, was "a person entitled to compensation" under section 33(g) of the LHWCA, 33 U.S.C. § 933(g), which provides in relevant part that "a person entitled to compensation" forfeits all future benefits if he settles a third party claim without the written approval of his employer. The Court held that, under the plain meaning of "entitlement," a person is entitled to compensation "at the moment his

to our promise, we will interpret the statute as it is written, and as we have been instructed by the Supreme Court to do with respect to this very Act. *See id.*

The plain language of the LHWCA requires that covered situses actually "adjoin" navigable waters, not, as the Director maintains, that they merely be in "the general geographic proximity" of the waterfront. *See* Br. of Director, OWCP at 47.[6] Because Congress

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right to recovery vest[s]," even though he has not yet received compensation payments from the employer and has not yet received a judgment in his favor. 505 U.S. at 477. If anything, the meaning of the word "adjoining" is even clearer than the meaning of the word "entitlement," and so Justice Kennedy's observation in *Cowart* applies with at least the same force in the context of section 903(a), which we interpret today:

> In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.

Id. at 475.

[6] That the entire litany ("pier, wharf," etc.) is found in a statutory parenthetical defining "navigable waters" as "including" these areas is further support for interpreting the phrase "other adjoining area[s]" so

did not specify a more technical definition of the word "adjoining" (if that is even possible), we must accord that word its ordinary meaning, *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989), as, incidentally, the legislative history confirms Congress intended, *see* S. Rep. 92-1125, 92d Cong., 2d Sess. 2 (1972) (emphasis added) ("The bill also expands the coverage of this Act to cover injuries occurring in the *contiguous* dock area related to longshore and ship repair work."). To be sure, dictionaries do include "neighboring" and "in the vicinity of" as possible definitions of "adjoining,"[7]

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as to require an immediate geographical nexus with navigable waters.

[7] The Fifth Circuit in *Texports* relied upon these secondary definitions in order to avoid what it believed to be the unacceptable consequences of a plain meaning interpretation of the statute:

> Although "adjoin" can be defined as "contiguous to" or "to border upon," it also is defined as "to be close to" or "to be near." "Adjoining" can mean "neighboring." . . . So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHW[C]A.

but such is not the ordinary meaning of the word; rather, the ordinary meaning of "adjoin" is "to lie next to," to "be in contact with," to "abut upon," or to be "touching or bounding at some point," *see* WEBSTER'S THIRD NEW INT'L DICTIONARY 27 (1993); *see also* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 424 (2d ed. 1975) ("'Adjoin' presumably means something like 'border on' or "have direct access to' navigable waters . . . ."). Accordingly, we hold that an area is "adjoining" navigable waters only if it "adjoins" navigable waters, that is, if it is "contiguous with" or otherwise "touches" such waters.[8] If there are other areas between the

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> To require absolute contiguity would be to reenact the hard lines that caused longshoremen to move continually in and out of coverage. It would frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity.

632 F.2d at 514-15.

[8] Sidwell argues that whether terminal expansion has forced relocation from a site directly adjoining navigable waters to one that does not adjoin such waters (but is the closest feasible), is relevant to whether a particular site adjoins navigable waters. We disagree. The exigency of even a forced relocation cannot transform a site distant from navigable waters into one

navigable waters and the area in question, the latter area simply is not "adjoining" the waters under any reasonable definition of that term.

Doubtless realizing that the common-sense definition of "adjoining" is as we have interpreted it, Sidwell and the Director argue, relying on *Texports*, 632 F.2d at 515, that the word "area" is sufficiently broad that the phrase "adjoining area" still covers the site where Sidwell's injury occurred. For example, the Director asserts it is "entirely reasonable" to consider the whole city of

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that somehow "adjoins" those waters. The site either adjoins navigable waters or it does not, and, as the Supreme court has instructed, that is a geographical inquiry.

The same must be said with respect to the fact that ECS had mobile trucks which went to the terminal to perform minor repairs on-site. That an employer sends some workers to the waterfront -- or even that an employer has a separate site altogether that is "adjoining" navigable waters -- is not germane to the question of whether an injury occurred at a covered situs. The statute is expressly limited to the place where the "injury occurr[ed]"; an employer's other activities or locations are irrelevant to the geographic inquiry of whether the injury occurred at a covered situs.

Norfolk or Portsmouth to be an "other adjoining area" to navigable waters. Br. for the Director, OWCP at 46. She presumably would be forced to agree as well, at least in principle, that the entire Commonwealth of Virginia is also an "area" adjoining navigable waters.

If we were required to define "area" in the abstract, we might well have to accept the Director's position, because it is indeed true in some sense that every location imaginable is within a larger area that ultimately adjoins some navigable waters. But the word "area" does not appear in the statute in isolation; rather, it is preceded by the words "other adjoining." The statute specifies that coverage extends to injuries sustained on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area* . . . ." To define "area" without reference to this language of qualification, is to ignore the definitional limits that inhere in the statute itself.

The use of the word "other" following the enumerated adjoining areas confirms that the scope and nature of the "other adjoining area[s]" are to be defined by reference to the enumerated areas; in other words, the

additional unenumerated covered areas are to be understood as of the same type as those enumerated. Even if the statute had not used the word "other," we would, under the familiar canon of statutory interpretation *noscitur a sociis*, still look to the enumerated items in the series to determine which other "adjoining areas" would satisfy the situs requirement. *See Beecham v. United States*, 114 S. Ct. 1669, 1671 (1994); *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990).

Thus, an "other adjoining area" as to which coverage extends must be *like* a "pier," "wharf," "dry dock," "terminal," "building way," or "marine railway."[9] Each of these enumerated "areas" is a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters. Therefore, in order for an area to constitute an "other area" under the statute, it must be a discrete shoreside structure or facility. And the asserted "area" must be "customarily

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[9] The only term of these that is perhaps not within the common knowledge is "building way," which is a technical term that means "an inclined structure usually of timber upon which a ship is built or upon which a ship is supported in launching." WEBSTER'S THIRD NEW INT'L DICTIONARY 2587 (1993).

used by an employer in loading, unloading, repairing, dismantling, or building a vessel," as the statute provides.[10] Moreover, although one might be tempted initially to eschew any reliance on conventional property lines in defining "other adjoining area[s]," we believe that it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single "other adjoining area."[11] Indeed, it is for this

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[10] Both the court in *Sea-Land* and the Director rely upon this statutory language following "other adjoining area" to contend that the customary use of an area should be determinative of the situs inquiry. This language, however, is a *further* restriction upon "other adjoining areas" -- implying that there are areas adjoining navigable waters that nonetheless do not meet the situs requirement because they are not customarily so used -- not an implicit elimination of the requirement that the area first be adjoining navigable waters. In any event, reading the language in the manner proposed by the Director collapses the separate status and situs requirements into a single inquiry into status, in contravention of the Supreme Court's injunctions in *Herb's Welding*, 470 U.S. at 426, and *P.C Pfeiffer Co.*, 444 U.S. at 79, that we not read the status and situs requirements as one and the same.

[11] In this regard, of course, it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured. As the Fifth Circuit explained in

reason that conglomerations of multiple properties, like the entire Commonwealth of Virginia, are not single "areas" under the

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Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176, 178 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977) (distinguished in *Texports*):

> [The back lot upon which a crane was located by which claimant was injured was somewhere] from 150 to 2,000 feet from the water's edge. In any event the physical distance is not decisive here. The test is whether the situs is within a contiguous shipbuilding area which adjoins the water. Alabama Dry Dock's shipyard adjoins the water. The lot was part of the shipyard, and was not separated from the waters by facilities not used for shipbuilding.

And as the Director has concluded:

> [I]t is not unusual for marine terminals to cover many hundreds of acres. Such terminals are covered in their entirety; it is not necessary that the precise location of an injury be used for loading or unloading operations (whatever may be the proper scope of "loading or unloading") . . . ; it suffices that the overall area which includes the location is part of a terminal adjoining water.

LHWCA Program Memorandum No. 58 at 10-11 (1977) (footnote omitted).

terms of the statute.

This definition, unlike any of those fashioned by our sister circuits, gives full effect to the statute's language, yielding to the maximum extent possible the "clear geographical boundary" that the Court has explicitly recognized that Congress intended:

> *[The] statute draws a clear geographical boundary* that will predictably result in workers moving in and out of coverage. . . . [T]here will always be a boundary to coverage, and there will always be people who cross it during their employment.

Herb's Welding, 470 U.S. at 427, 426 (emphasis added).

At the same time, without extending coverage to "all those who breathe salt air," *id.* at 423, this interpretation achieves the "broad" remedial purposes for which the legislation was enacted, *see P.C Pfeiffer Co[.]*, 444 U.S. at 74, 78. The LHWCA was enacted to address a specific problem, and the actual language that Congress chose does just that. The problem, as we have explained, was

that longshoreman loading and unloading ships walked in and out of LHWCA coverage as they walked the gangplank from ship to shore. In response, Congress extended coverage to both navigable waters *and* "the adjoining land area," S. Rep. 92-1125, 92d Cong., 2d Sess. 13 (1972), so that the longshoremen at both ends of the gangplank would be covered equally by the LHWCA. As the Supreme Court has repeatedly stated, "Congress intended that a worker's eligibility for federal benefits would not depend upon whether he was injured while walking down a gangway or while taking his first step onto the land," *P.C. Pfeiffer*, 444 U.S. at 75; rather, coverage would extend to "the waterfront areas where the overall loading and unloading process occurs." *Northeast Marine*, 432 U.S. at 272; *see also Herb's Welding*, 470 U.S. at 423 (explaining that Congress expanded coverage to include "rather large *shoreside* areas" (emphasis added)). The definition we adopt today ensures coverage for all maritime employees injured in the waterfront areas where the loading, unloading, and repair of vessels occurs, as Congress plainly intended and as the Supreme Court has directed.

In interpreting the act as we do, we realize that if Congress were confronted today

with further amendments to the statute, it conceivably might choose to cover areas in the "general proximity" or in the "neighborhood of" or "functionally related" to navigable waters. But we have no authority to concern ourselves with this possibility. There is no question at all that *in 1972* Congress was concerned only with areas immediately at waterside, where the loading and unloading of ships occurs, not with facilities separated and at some distance from the navigable waters. And here, no less so than in *Cowart*,

> [i]t is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. . . . It is Congress that has the authority to change the statute, not the courts.

505 U.S. at 483-84.

With the understanding of the express language and the purpose of the statute described above, it is evident that ECS is not an "other adjoining area" within the meaning

of the LHWCA.[12] While the ECS facility is arguably an "area" within the terms of the statute, it is not an area "adjoining" navigable waters. And, while the expanse of property between the navigable waters and ECS (together with structures and facilities that occupy that property) is, in some sense, "adjoining" navigable waters, it is not an "area" within the meaning of the statute. Accordingly, Sidwell was not injured on a covered situs under the LHWCA.

III.

This is not a case in which ultimately the Director's interpretation of the statute is deserving of deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). The

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[12] ECS also fails the *Brady-Hamilton* test and even a "totality of the circumstances" test. The ALJ expressly found that "there are no outstanding characteristics of the site that make it especially suitable for maritime use," the adjoining properties are not devoted primarily to maritime uses (indeed, many of them are residential), the terminal gates are 8/10 of a mile from the site, and the water is even farther. J.A. at 76. Therefore, even if we had declined to read the statute as it is written, and had instead adopted the *Brady-Hamilton* test or simply looked to the totality of the circumstances, we would still have affirmed the Board.

Director argues, in particular, that we should defer to OWCP's interpretation of the LHWCA as contained in "LHWCA Program Memorandum No. 58," an internal memorandum prepared in 1977 entitled "Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act," which purports to "reflect OWCP's position" on the Act's coverage. This memorandum discusses situs in only slightly over a page of double-spaced text, none of which analyzes the statute, attempts to define a general rule or test for what constitutes an "other adjoining area," or otherwise purports to "interpret" the Act. *See id.* at 10-11. Essentially all it does is describe the factual circumstance of *Texports*, where the Act was held to apply, and state that coverage "should" extend to that circumstance. *Id.* at 11.

We are not certain that this brief passage from the 1977 internal memorandum even constitutes an actual agency interpretation of the LHWCA;[13] even if it were such an

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[13] Our uncertainty is prompted both by the opacity of the language in the Memorandum and by the notable absence of language purporting to establish any interpretive rule. Additionally, the fact that the arguments made by the Director in her brief extend

interpretation, it certainly would be entitled to less deference than a formal agency interpretation.[14] We are not certain in any event that the 1977 Memorandum contradicts our interpretation of the statute; while the memorandum arguably embraces at least the outcome of *Texports*, it also notes, in describing the purposes of the Act, that "[the

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beyond any arguments that would be supported by the Memorandum suggests that the Memorandum alone does not clearly support her position. Of course, no deference is owed her "interpretations" that are advanced only in the context of this litigation. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate.").

[14] As the Court explained in *Martin v. OSHRC*, 499 U.S. 144, 157 (1991) (citations omitted) (emphasis added),

> [an agency] regularly employs less formal means of interpreting regulations prior to issuing a citation. These include the promulgation of interpretive rules and the publication of *agency enforcement guidelines. Although not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers*, these informal interpretations are still entitled to some weight on judicial review.

1972 Amendments] exten[ded] . . . the Act's geographical coverage to the *waterfront facilities* at which such workers are employed . . . ." *Id.* at 5 (emphasis added). Assuming, however, that the 1977 Memorandum is a formal, official agency interpretation and assuming further that that interpretation is implicitly that adopted in *Texports*, that interpretation is not a reasonable interpretation of the statute. For *Texports*, as the Director acknowledges in the Memorandum, extends coverage to sites that concededly do not adjoin navigable waters, *id.* at 11, contrary to the plain language of the Act. Indeed, the only limitation to coverage that the Director is willing to acknowledge in her briefs is that a location 1000 miles from navigable waters cannot be considered to adjoin those waters. *See* Br. for the Director, OWCP at 42. And in reality, the interpretation she urges would not recognize even this modest limitation. As her counsel conceded at argument, under the Director's interpretation even an injury in Kansas City, Kansas, would be covered under the Longshore and Harbor Workers[']' Compensation Act as an injury occurring on an area adjoining navigable waters. If we, as courts, are required to yield to such an interpretation, then we have little to no role to play in the

interpretation of federal statutes.

For the reasons stated, the judgment of the Board is affirmed.

AFFIRMED

BEATY, District Judge, concurring:

I concur only in the results reached by the majority opinion in affirming the decision of the Administrative Law Judge (ALJ). The ALJ correctly applied the *Brady-Hamilton* test which was cited with approval in *Humphries*. This test provides a sufficient mechanism to resolve, on a case by case basis, situs issues raised by 33 U.S.C. § 903(a) as a part of the Longshore and Harbor Workers' Compensation Act (LHWCA). The facts of the present case do not justify abandoning *Brady-Hamilton*, and creating a more restrictive interpretation of the situs test so as to preclude coverage for injuries sustained by maritime employees.

As indicated by footnote 12 of the majority opinion, the ALJ correctly applied the factors of *Brady-Hamilton* and "expressly found that 'there are no outstanding characteristics of the site that make it especially suitable for maritime use,' the

adjoining properties are not devoted primarily to maritime uses (indeed, many of them are residential), the terminal gates are 8/10 of a mile f~ m the site, and the water is even farther." The majority opinion further acknowledges that application of the *Brady-Hamilton* test was enough to deny coverage for failure to comply with the situs requirement.

With the expansion of terminal operations shrinking the available sites that actually touch navigable waters, as well as the development of technology that will increasingly push maritime work ashore, the *Brady-Hamilton* test provides an appropriate guidepost to determine whether the situs requirement has been met. Application of the test also makes it possible to draw a boundary line to coverage without being unnecessarily restrictive.

The majority, however, now favors creation of a more literal interpretation which will serve to exclude coverage, if the site in question does not actually touch navigable waters. This new test is crafted by defining "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" as merely an

extension of the enumerated sites which actually touch navigable waters. Such an interpretation would render the additional proviso superfluous. Congress by use of the phrase "or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" provided a description of additional areas that would satisfy the situs test without requiring these additional sites to actually touch navigable waters. If Congress intended to further limit coverage, there would have been no need to describe additional covered sites beyond those already enumerated in the statute.

In appropriate circumstances, consistent with *Brady-Hamilton*, an injury to a maritime employee on an "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" could be covered, even where the site did not actually touch navigable waters. However, based upon the facts of the present case, the ALJ's decision was a correct application of the *Brady-Hamilton* test which should not be abandoned by this Court. Simply put, the situs requirement was not met in this case, and covered [sic] should be denied to Sidwell. I concur in the results only to the extent that the decision of the Administrative Law

Judge should be affirmed.

APPENDIX B

Decision of the Benefits Review Board, Unites States Department of Labor, dated December 29, 1994: Sidwell v. Express Container Services, Inc., BRB No. 92-1720 (1994).

U.S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

BRB No. 92-1720

NOT PUBLISHED

CHRISTOPHER S. SIDWELL	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
EXPRESS CONTAINER	)	DEC. 29, 1994
SERVICES, INCORPORATED	)	
Self-Insured	)	
Employer-Respondent	)	

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk Virginia, for claimant.

Thomas J. Duff and F. Nash Bilisoly (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-0242) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

Claimant sustained an injury on June 11, 1990, while working for employer as a container mechanic at its Chautauqua facility in Portsmouth, Virginia. Claimant worked for employer in this capacity for 14 years. Employer is in the business of repairing cargo

containers and the chassis used to carry them. Employer voluntarily paid claimant temporary total disability benefits under the Virginia Workers' Compensation Act from June 12, 1990, through September 14, 1990, as well as medical benefits. Claimant sought compensation under the Longshore Act.

Employer's facility was previously located on Hill Avenue, next to the gate of Portsmouth Marine Terminals, in Portsmouth, Virginia, where vessels are loaded and unloaded from the Elizabeth River. In 1985, however, the Virginia Port Authority expanded the terminal and purchased employer's Hill Street location. At that time, employer relocated to its present Chautauqua Avenue location, eight-tenths of a mile from the terminal. The new location is surrounded by various businesses, including a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air-conditioning contractor, a gas station, a fire station, a container yard, a Nissan-owned storage area, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway. The new site is located in an area zoned M-2, heavy industrial.

Employer's president, Wayne Matthews, testified that his company contracts directly with steamship lines and does not have any agreement with the terminal itself or with the Virginia Port Authority. He related that approximately 90 percent of the containers and chassis arrived at the site via inland roads, while the remainder come directly from the terminal. Once the equipment is checked and repaired, employer notifies the steamship company and a carrier picks it up. Employer also performs minor repairs at the terminal site using mobile trucks.[1] Employees do not normally alternate between the terminal and Chautauqua sites; claimant worked at the latter location. Until the beginning of 1990 shipside work at the terminal was available on weekends to all mechanics as overtime on a rotating basis; subsequently, however, overtime work is available to mechanics at their usual place of work.

The administrative law judge found that claimant met the status test of Section 2(3) of the Act, 33 U.S.C. § 902(3), since maintenance and repair is essential to the

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[1] Minor repairs were identified as those under $300, involving changing a tire, fixing a light or repairing a mud flap. Tr. at 35.

continued use of containers in longshoring operations. The administrative law judge determined, however, that the situs requirement of Section 3(a) of the Act, 33 U.S.C. § 903(a), had not been met, reasoning that employer's Chautauqua site did not qualify as an "adjoining area" under the "functional relationship" test set forth in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

On appeal, claimant argues that the administrative law judge erred in finding that his injury did not occur on a covered maritime situs. Claimant asserts that the Act must be liberally construed and that the 1972 Amendments indicate that an expansive view of coverage should be taken. Employer responds, urging that the administrative law judge's finding that the Chautauqua facility is not a covered situs be affirmed. In the alternative, employer argues that claimant did not meet the status test, as the vast majority of container and chassis repair performed by employer is done in anticipation of land rather than maritime transportation.

To be covered under the Act, claimant must satisfy both the "status" requirement of Section 2(3) and the "situs" requirement of

Section 3(a). *See P.C Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 74, 11 BRBS 320, 322 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264, 6 BRBS 150, 159 (1977). The status inquiry under Section 2(3) involves an analysis of the employee's overall employment duties. *Id.* The situs requirement of Section 3(a) covers employees injured in specified locations.

Section 3(a) provides coverage for disability resulting from "an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C § 903(a) (1988). An injury not occurring on one of the enumerated locations is covered under the Act only if the location of the injury is an "adjoining area" under Section 3(a). *See Herron*, 568 F.2d at 140, 7 BRBS at 411; *Felt v. San Pedro Tomco*, 25 BRBS 362 (1962) (Stage, C.J., concurring and dissenting). Claimant contends on appeal in this case that employer's Chautauqua facility was an "adjoining area," arguing that the United States Supreme Court has held that the Act must be liberally construed in favor of

the injured employee. Claimant further asserts that the various courts of appeals which have considered this issue have held that situs includes far more than those locations along the water's edge.

Initially, claimant asserts that the administrative law judge erred in analyzing whether employer's Chautauqua location is an "adjoining area" under the "functional relationship" test set forth in *Herron*, 568 F.2d at 139, 7 BRBS at 411. Claimant contends that this issue should have been analyzed under the decision of the United States Court of Appeals for the Fifth Circuit in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), *aff'g on recon. en banc*, 554 F.2d 245, 6 BRBS 265 (5th Cir. 1977). We do not agree that *Winchester* necessarily leads to a different result than the test set forth in *Herron*. Both cases recognize that situs does not turn on physical contiguity to water but is defined by function. The "area" must be one "customarily used by an employer in loading, unloading, ..." 33 U.S.C. § 903(a). In *Humphries v. Director*, OWCP, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 108 S.[]Ct. 1585 (1988), moreover, the United States Court of Appeals for the Fourth

Circuit, within whose appellate jurisdiction this case arises, discussed both *Winchester* and *Herron*. The court characterized the Fifth Circuit's decision in *Winchester* as "an opinion which struggled bravely with the issue, [but] ended up with little more than a litany of factors which are not conclusive in a situs determination. . . ." *Humphries*, 834 F.2d at 374, 20 BRBS at 22 (CRT). The *Humphries* court, however, cited the "functional relationship" test set forth in *Herron* with approval, recognizing that it appeared to be "a more practical approach." *Id.*[2]

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[2] In *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 108 S.[]Ct. 1585 (1988), claimant was struck by a car and was seriously injured coming from a restaurant "well over a mile from the terminal along a public highway which did not connect any portions of employer's operations or traverse continuous or contiguous terminal areas." *Id.*, 834 F.2d at 838, 20 BRBS at 24 (CRT). The restaurant was separated from the river and the nearest maritime terminal by a residential neighborhood. The court held that while a broad interpretation of the maritime situs requirement is warranted on statutory and policy grounds, the facts in this case "militate against any description of the accident scene as a maritime situs." *Id.* The court stated that the restaurant was not an "integral part" of the terminal. *Id.*

Factors to be considered in determining whether a site is an "adjoining area" under the *Herron* test include: the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all the circumstances in the case. *See Herron*, 568 F.2d at 139, 7 BRBS at 411. In *Davis v. Doran Company of California*, 20 BRBS 121 (1987), *aff'd mem.*, No. 88-3505, 22 BRBS 3 (CRT) (4th Cir. 1989) (unpublished), the Board applied the *Herron* analysis and held that the place of business of the employer, who was engaged in the business of repairing marine propellers, did not meet the situs test. The facility did not front on water, was one mile by air and two miles by street from water, and was in an area not essentially maritime, as indicated by the presence of a bottling company, a linen service, an auto body shop, a public park, office buildings and residential houses in the area. The Board noted that the site was not chosen for its proximity to navigable waters and that such was merely fortuitous. The decision of the Board was affirmed by the Fourth Circuit in an unpublished opinion.

Applying the "functional relationship" criteria, the administrative law judge in the present case properly found that employer's Chautauqua facility is not an "adjoining area." The administrative law judge found that due to the mobile nature of containers and chassis, employer's business did not require a site particularly suited to maritime purposes.[3] The administrative law judge noted that 90 percent of the equipment brought into employer's facility came from interstate or other inland roads, thereby obviating the need for proximity to the terminal. The administrative law judge further determined that neither the adjoining properties nor those en route to the terminal were primarily devoted to maritime commerce; he found that the zoning was primarily residential and that with the exception of another container yard, the businesses present consisted of a wide variety of light commercial and non-maritime industrial uses. In addition, the administrative law judge noted that while the

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[3] Although the administrative law judge cited *Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982), it is the Board's decision which was affirmed by *Motoviloff, Bennett v. Matson Terminals, Inc.*, 14 BRBS 526, 530 (1981) (Miller, J., dissenting), that contains the rationale supporting the administrative law judge's statement.

gates of the terminal are eight-tenths of a mile from employer's facility, and the waterway beyond that, employer's site does not border any shipyard, railway, marine terminal or other facility used for loading or unloading of ships, vessels, or marine cargo. Decision and Order at 6. Finally, the administrative law judge determined that employer's location had not been chosen because of maritime concerns but simply because the City of Portsmouth offered employer low-rate industrial revenue financing. The administrative law judge inferred that since employer looked at different sites, including some in Chesapeake, geographical proximity to the terminal was not a primary concern.

Claimant argues that employer's facility is a covered situs as employer relocated only due to the expansion of the port, it remained in the same maritime business and chose a site near the terminal, and the new location was more spacious and efficient, thereby improving employer's maritime business. The administrative law judge reasonably found that the nature of employer's business did not require that the site be particularly well-suited for maritime purposes. Moreover, while claimant argues that the new site was

the closest to the port available at the time of relocation, the administrative law judge in this case reasonably concluded that employer had chosen the Chautauqua site for economic reasons. The administrative law judge's finding is supported in the record by the testimony of Wayne Matthews, employer's president. Although Mr. Matthews testified that the Chautauqua site was the closest site to the terminal available at the time of the relocation, he also stated that the site had been chosen because of the favorable financing offered by the City of Portsmouth. Tr. at 45-46.

Claimant's argument that since employer's overall work activities have not changed since it moved from the terminal, workers such as claimant who are engaged in maritime employment remain covered by Section 3(a), also must fail.[4] Claimant's argument confuses the determination of status with that of

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[4] In *Sea-Land Service, Inc. v. Director, OWCP [Johns]*, 540 F.2d 629, 4 BRBS 289 (3d Cir. 1976), the Third Circuit, employing a similar analysis to that suggested by the claimant[,] virtually eliminated the situs requirement. In *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988), the Fourth Circuit characterized the *Sea-Land* approach as unacceptable.

situs. The breadth of the requirements of claimant's employment does not enlarge situs under the Act; thus, an employee injured while working off a covered situs is not covered by the Act even if within the course of maritime employment. *See Eckhoff v. Dog River Marina and Boat Works, Inc.*, 28 BRBS 51 (1994); *Cabaleiro v. Bay Refractory Co[.], Inc.*, 27 BRBS 72 (1993). Moreover, the fact that a site is used for a maritime purpose does not automatically bring it within the coverage of Section 3(a); rather, the situs inquiry looks to the relationship of the place of injury with navigable waters. *See Anastasio v. A.G. Ship Maintenance*, 24 BRBS 6 (1990); *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd*, 853 F.2d 919 (3d Cir. 1988) (table); *Davis*, 20 BRBS at 125; *see also Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426-27, 17 BRBS 78, 83-84 (CRT) (1985); *Caputo*, 432 U.S. at 249, 6 BRBS at 150. While claimant also contends that mobile trucks were dispatched to the terminal to perform minor shipside repairs, the record indicates that claimant worked only at the Chautauqua site, and it is undisputed that his accident occurred there.

As coverage under Section 3(a) is determined by the nature of the place of work

at the moment of injury, we reject claimant's arguments that performing maritime work converts a site to an area covered by the Act.[5] As the administrative law judge properly applied the "functional relationship" test, and his conclusions are rational, supported by substantial evidence of record and in accordance with law, his determination that claimant's injury did not occur on a covered situs is affirmed. *Accord Lasofsky*, 20 BRBS at 60; *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982). The administrative law judge's denial of the

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[5] As the administrative law judge's finding that claimant's injury did not occur on a covered situs is dispositive, we need not address employer's argument that claimant did not have status under the Act. We note, however, that employer's argument that claimant was not engaged in maritime employment because repair of the vast majority of containers and chassis at employer's facility was done in anticipation of land and not maritime transportation, is without merit. It is well settled that container repair is covered employment, as it involves an integral part of an ongoing longshore operation. *See, e.g., Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1988), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990); *Caldwell v. Oceanic Container Service, Inc.*, 13 BRBS 153 (1980); *Insinna v. Sea-Land Service, Inc.*, 12 BRBS 772 (1980); *Cabezas v. Oceanic Container Service, Inc.*, 11 BRBS 279 (1979).

claim is therefore affirmed.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

CERTIFICATE OF SERVICE

BRB No. 92-1720: Christopher S. Sidwell v. Express Container Services and Travelers Insurance Company (Case No. 91-LHCA-0242) (OWCP No. 05-0076027)

I certify that this Decision and Order was sent this day to:

_____ _____

Date Paul E. Trayers
Clerk of the Board

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APPENDIX C

Decision of Administrative Law Judge Richard K. Malamphy, dated May 7, 1992: Sidwell v. Express Container Services, Inc., 26 BRBS 127 (ALJ) (1991) (ALJ No. 91-LHC-0242).

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
CASE No. 91-LHC-242
OWCP No. 5-76027

In the Matter of

CHRISTOPHER S. SIDWELL,
Claimant,

v.

EXPRESS CONTAINER SERVICES,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-In-Interest.

APPEARANCES:

John H. Klein, Esq.,
For The Claimant

Thomas J. Duff, Esq.,
For The Employer

BEFORE: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (hereinafter the "Act").

A formal hearing was held December 2, 1991 in Hampton, Virginia, at which all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions,

regulations and pertinent precedent.[1]

STIPULATIONS

The Employer and the Claimant stipulate, and I find:

1. At all relevant times, an employer/employee relationship existed.

2. The Claimant sustained an injury arising out of and in the course of his employment on June 11, 1990.

3. The claim was timely filed, there was timely notice of injury, and there was timely controversion by the Employer.

4. The Claimant was paid compensation by the Employer under the state Workers' Compensation Act for the period June 12th through September 14th, 1990.

5. The Claimant's medicals were paid

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[1] The following abbreviations will be used as citations to the record:

CX- Claimant's Exhibits
EX- Employer's Exhibits
TR- Transcript of the Hearing

by the Employer under the state Workers' Compensation Act.

ISSUES

Whether this claim falls under the jurisdiction of the Act?

What is the Claimant's average weekly wage?

FINDINGS OF FACT

Testimony of Christopher Sidwell

Claimant was employed as a container mechanic at the time of his injury. (TR 14). He has been employed by Employer for fourteen (14) years, during which time he has been a member of the International Longshoreman's Association. (TR 13). He testified that his job was to repair containers, units used for importing and exporting goods, and the chassis used to carry the containers over the road. (TR 16-17). Employer performs repairs both at shipside and at its Chautauqua Avenue site, but Claimant has worked only at the Chautauqua site since 1988. (TR 19-20, 23-24). Claimant testified that, on June 11, 1990, he was pulling a chassis from a repair bay with a Hustler when the door suddenly flew open and

he almost fell out, resulting in an injury (TR 21).

Testimony of Wayne T. Matthews

Mr. Matthews is the President of Express Container Services (hereinafter "Express") and has been for approximately 15 years. (TR 33). Express primarily repairs cargo containers and chassis. They contract directly with steamship lines and do not have any agreement with the terminal itself or with the Virginia Port Authority. (TR 34). Mr. Matthews testified that approximately ninety (90) percent of the containers and chassis come into the site via inland roads, and that the rest come directly from the terminal. After the equipment is checked and any necessary repairs are performed, the steamship company is notified and a carrier comes to get it. (TR 36-37). Express also performs minor repair work at the terminal site by means of mobile trucks. (TR 38). Employees do not normally alternate from the shop site to the mobile trucks or vice versa, rather they work at one or the other. (TR 39). Mr. Matthews testified that he classified Claimant as a major repair mechanic assigned to work in the Chautauqua site's shop. (TR 42). Shipside work used to be available on weekends as overtime on a

rotation basis to all mechanics, but that changed near the beginning of 1990 such that shop mechanics did their overtime in the shop and the terminal mechanics worked shipside. (TR 41).

Mr. Matthews testified that in 1985, the state was interested in buying Express' former location, the Hill Avenue site, to expand the terminal, so Express sought a new location. (TR 43-45). He said Express looked at a number of sites, but the city of Portsmouth offered the best deal on the Chautauqua site, including low rate industrial revenue financing which "really sold us." (TR 45). He agreed that the Chautauqua was the closest one available to the terminal, and that it has larger bays and more storage area than the Hill Avenue site. (TR 46).

Testimony of Shelby West

Mr. West is the Zoning Administrator for the City of Portsmouth and has been for the last 29 years. (TR 52). Using a map, Mr. West described the area involved, including the terminal and the Chautauqua site. (EX C). He outlined the most direct route between the two, a route covering eight tenths (8/10) of a mile. (TR 54-55). He listed the businesses

and properties in the immediate surrounding area, including: a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air conditioning contractor, a gas station, a fire station, a container yard, a storage area owned by Nissan, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway. (TR 56-66).

He testified that Express was previously located on Hill Avenue, adjacent to the terminal, but that they moved in 1985 to the Chautauqua site. (TR 34). He also testified that Express is located in an area zoned M-2, or heavy industrial, but that container repair can also be done in M-1, or light industrial areas.

DISCUSSION AND CONCLUSIONS OF LAW

Before 1972, coverage under the Act was determined primarily by the traditional "locality" test of maritime tort jurisdiction. This test resulted in longshoremen moving in and out of coverage as they moved from ship to pier. In 1972, Congress amended the Act to

protect these so-called "amphibious workers." First, Congress extended the Act landward by including "any adjoining pier, wharf, dry dock, terminal, building way, marine way, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." 33 U.S.C. § 903(a). This is traditionally referred to as the "situs" requirement. Congress also added a parallel "status" requirement limiting the landward coverage to workers "engaged in maritime employment including any longshoremen or other [person] engaged in longshore operations and any harbor workers including a ship repairman, ship builder, and ship breaker[. . . . .]" 33 U.S.C. § 902(3). It is well settled that both status and situs must be established before jurisdiction can be asserted under the Act. Humphries v. Director, OWCP, 834 F.2d 372, 374 (4th Cir. 1987).

Status

Employer contends that Claimant does not satisfy the status test because his work is devoted to facilitating the movement of containers and chassis over land. I cannot agree, since it seems indisputable that continual maintenance and repair is essential to the continued use of containers in

longshoring operations. The Board has held likewise on many occasions. See Caldwell v. Oceanic Container Service, Inc., 13 BRBS 153 (1980); Insinna v. Sea-Land Service, Inc., 12 BRBS 772 (1980); Cabezas v. Oceanic Container Service, Inc., 11 BRBS 279 (1979).

Situs

In interpreting Section 903(a), the "situs" test, the Supreme Court has ruled that the language of the Act is broad and should be liberally construed in order to avoid any harsh results under this remedial type of legislation. P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 74, 100 S.[ ]Ct. 328, 333, 62 L.Ed.[]2d 225, 230 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 267-68, 97 S.[ ]Ct. 2348, 2359, [53] L.Ed.[]2d 320 (1977). Consequently, the Court has taken an expansive view towards the Act in order to extend coverage. Nevertheless, even with this expansive view in mind, the Court has clearly stated that "there will always be a boundary to coverage, and there will always be people who cross it during their employment." Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426, 105 S.[ ]Ct. 1421, 1429, 84 L.Ed.[]2d 406, 414 (1985).

The Fourth Circuit faced the situs test in Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), and acknowledged that "a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime operation'" in order to qualify as a maritime situs under the Act. Id.[] at 373-74. However, the court also recognized that boundaries to coverage do exist. Davis v. Doran Company of California, 22 BRBS 3 (4th Cir. 1989). The court in Humphries approvingly cited the Ninth Circuit approach to determining situs boundaries enunciated in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1987). The Brady-Hamilton test employs a four-pronged analysis in determining if an area is maritime. The four factors are:

> 1. The particular suitability of the site for the maritime uses referred to in the statute;
>
> 2. Whether adjoining properties are devoted primarily to uses in maritime commerce;
>
> 3. The proximity of the site to the waterway;

4. Whether the site is as close to the waterway as is feasible given all of the circumstances.

In the present case, there are no outstanding characteristics of the site that make it especially suitable for maritime use. As the Board stated in Motoviloff v. Director, OWCP, 692 F.[]2d 87 (9th Cir. 1982), container and chassis repair does not require a site particularly suited to maritime purposes due to their mobile nature. Here, ninety percent (90%) of the equipment brought into the Chautauqua site came from interstate or other inland roads. Thus, proximity to the terminal is not essential for the Employer's business.

As described by Mr. West, the properties adjacent to Express' site, as well as those en route to the terminal, are definitely not primarily devoted to maritime commerce. The wide variety of businesses enumerated above consist mainly of light commercial and industrial uses, none of which are maritime in nature, other than the one container yard. In fact, there is more residential zoning in the area than any other use, and, as such, the area hardly qualifies as 'primarily maritime'.

The third factor is proximity to the waterway. Mr. West testified that the gates of the terminal are eight tenths (8/10) of a mile from the Chautauqua facility, and, as evidenced by the map, the waterway is beyond that. The site does not adjoin or border any shipyard, railway, marine terminal or other facility used for the loading and unloading of ships, vessels or marine cargo.

The last factor looks at whether the site is as close to the waterway as feasible. In 1985, the Employer moved from its previous location, adjacent to the terminal, to its present site. Mr. Matthews testified Express looked at various locations in different cities, but that what 'sold' them was the City of Portsmouth's offer for low-rate industrial revenue financing. The fact that Express looked at different sites, including some in Chesapeake, shows that geographical proximity to the terminal was not a primary concern.

Application of the Brady-Hamilton test shows that the Employer's Chautauqua site lacks a "functional relationship" with the navigable waters. Because situs is lacking, I need not address the average weekly wage issue.

ORDER

Accordingly, the Claimant's claim for compensation under the Act is hereby DENIED for lack of subject matter jurisdiction.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ABC/ccb
DATED: MAY 7, 1992
Hampton, Virginia

APPENDIX D

Order of the United States Court of Appeals for the Fourth Circuit Filed on January 29, 1996.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER S. SIDWELL,
Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, No. 95-1101
Intervenor,

v.

EXPRESS CONTAINER SERVICES, INCORPORATED,
Respondent.

ORDER

Upon a poll of the active circuit judges on a sua sponte suggestion of rehearing en banc, a majority of the judges voted to deny rehearing en banc.

Chief Judge Ervin and Judges Hall, Murnaghan, Michael and Motz voted to rehear

the case en banc. Judges Russell, Widener, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig and Williams voted against rehearing en banc.

Entered at the direction of Judge Luttig.

For the Court,

/s/ Bert M. Montague

CLERK

APPENDIX E

Order of the United States Court of Appeals for the Fourth Circuit Filed on February 20, 1996.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER S. SIDWELL,
Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, No. 95-1101
Intervenor,

v.

EXPRESS CONTAINER SERVICES, INCORPORATED,
Respondent.

ORDER

Director, OWCP has filed a motion for extension of time to file a petition for rehearing.

The Court denies the motion.

FOR THE COURT,

/s/ Bert M. Montague

CLERK

APPENDIX F

United States Court of Appeals
Circuit Filed on February 20,

STATES COURT OF APPEALS
. THE FOURTH CIRCUIT

SIDWELL,
Petitioner,

CE OF WORKERS'
'ROGRAMS, UNITED
IENT OF LABOR, No. 95-1101
Intervenor,

:NER SERVICES,

Respondent.

MANDATE

ıent of this Court dated 12/28/95
:oday.

Bert M. Montague
CLERK

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